

DECISION



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THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-206950.2

DATE: May 6, 1982

MATTER OF: Colorado Elevator Service, Inc.

DIGEST:

Letter from bank, attached to bid, stating that the bank would extend a letter of credit on behalf of the bidder "subject to our normal credit procedures" was not an irrevocable letter of credit and was not an adequate bid guarantee. This deficiency, which made the bid nonresponsive, could not be cured by the bidder's hand-delivery of an acceptable letter of credit two weeks after bid opening.

Colorado Elevator Service, Inc. protests the rejection of its bid as nonresponsive for failing to provide an adequate bid guarantee as required by invitation for bids (IFB) No. 82-09-022, issued by the General Services Administration (GSA). We find that the bid was properly rejected and summarily deny the protest without benefit of an agency report.

The IFB, which was for elevator maintenance service, contained the following requirement:

"BID GUARANTEE - Bids shall be accompanied by a bid guarantee of not less than 20% of the amount bid for all services for the term of the contract. Failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

"A bid guarantee shall be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States.
* * *

Bids were opened on March 25, 1982, and Colorado was the apparent low bidder. Accompanying Colorado's bid was a letter from a local bank, dated March 25, 1982, which read in pertinent part.

"Fidelity Bank of Denver will extend a letter of credit on behalf of Colorado Elevator Company in the amount of \$7,500.00. Our willingness to extend the letter of credit will be subject to our normal credit procedures.* * *"

GSA rejected Colorado's bid on the basis that its bid guarantee was inadequate since the letter was not an irrevocable letter of credit and did not satisfy the solicitation's requirement for a "firm commitment."

The protester concedes that the letter is not an irrevocable letter of credit, but points out that it later satisfied the bid guarantee requirement on April 12, 1982, when an irrevocable letter of credit was hand-delivered to the agency. Colorado's counsel views the legal effect of both letters as follows:

"The first letter from the bank guarantees the production of the irrevocable letter of credit, thus my client was not intending to avoid the requirement, but rather as a small business was postponing the actual cost of purchasing the letter from the bank. This now has been done and hand-delivered to the office making the award and surely removes any doubt of my client's sincere endeavor to comply with all requirements."

The protester also contends that the April 12 letter should be considered under that portion of the "Late Bids" clause which states that "a late modification of an otherwise successful bid which makes its terms more favorable to the Government will be considered at any time it is received and may be accepted." Colorado further maintains that since the "Bid Guarantee" provision uses the word "may" in relation to bid rejection, the agency in its discretion may waive the deficiency.

We disagree. The protester's admission that the letter of March 25 did not constitute a firm commitment, as required by the solicitation, recognizes that the bank's communication of an intention to extend a letter of credit at an indefinite time in the future, subject to the bank's credit procedures, did not provide the Government with irrevocable access to funds. It was not a promise to honor, without exception, the drafts or other demands for payment made by the beneficiary, GSA. See Larry E. Jones, B-195484, October 24, 1979, 79-2 CPD 288. Therefore, the bid guarantee submitted with the bid was inadequate.

The failure of a bidder to present an adequate bid guarantee at the time of bid opening renders the bid non-responsive. Zemark International Construction Co., B-203020, May 12, 1981, 81-1 CPD 372. We have held that the statement in the bid guarantee requirement that failure to comply "may be cause for rejection" of a bid is just as compelling and material as if more positive language were employed. Consolidated Installations Corp., B-202630, April 20, 1981, 81-1 CPD 301. As a result, there is no blanket discretion in the contracting agency to waive deficiencies in bid guarantees. See 38 Comp. Gen. 532 (1959). The exceptions to this rule contained in Federal Procurement Regulations (FPR) § 1-10.103-4 are very narrow, and the only one even arguably applicable here is contained in subsection (c) of section 1-10.103-4. It provides that the failure to meet the bid guarantee requirement of the invitation may be waived if the bid guarantee is received late and the late receipt may be waived under the rules established in FPR § 1-2.303 for consideration of late bids.

The delivery by hand of an acceptable letter of credit more than two weeks after bid opening does not qualify for waiver under FPR § 1-2.303. The provisions of that section which relate to mailed and telegraphic bids or modifications do not apply to this situation. With respect to hand-carried bids, FPR § 1-2.303-5 provides that a "late hand-carried bid * * * shall not be considered for award." It follows that where the bid as timely submitted lacks some material element--such as an acceptable bid guarantee--which renders the bid nonresponsive, the late bid provisions do not permit that defect to be cured by hand-carrying a correcting document to the agency after bids have been opened.

Colorado suggests that its bid may be accepted pursuant to the provision in the IFB which states that a late modification to an "otherwise successful" bid which makes the terms of the bid more favorable to the Government may be considered at any time it is received.

The purpose of this provision is to allow the Government to accept more favorable terms from the low bidder that will be awarded the contract. If the Government elects to consider a late modification received from an otherwise acceptable low bidder, other bidders may not complain because their relative standing is not affected. Blue Cross of Maryland, Inc., B-194810(1), August 7, 1979, 79-2 CPD 93. However, a late modification may only be accepted pursuant to this provision if the bid is acceptable as originally submitted. King-Fisher Company, B-192480, November 3, 1978, 78-2 CPD 321. Colorado's bid, as originally submitted, was not acceptable because it included an inadequate bid guarantee. It therefore did not have an "otherwise successful" bid within the context of this provision.

Although the protester characterizes the rejection of its bid as an elevation of form over substance, we believe there are sound policy reasons for rejecting bids in situations such as this. The facts of this case are analogous to those in our decision which is reported at 42 Comp. Gen. 725 (1963). There, a low bidder advised the bid opening officer prior to bid opening of the low bidder's intention to furnish a bid bond, but the bond was not received by the contracting officer until after bid opening. We held that the low bid was nonresponsive and must be rejected based on the rationale in 38 Comp. Gen. 532, supra, in which we stated:

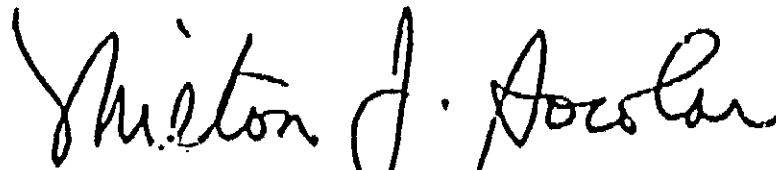
"* * * permitting waiver of a bid bond requirement stated in an invitation for bids would have a tendency to compromise the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have his bid rejected, (2) causing undue delay in effecting procurements, and (3) creating, by the necessary subjective determinations by different contracting officers, inconsistencies in the treatment of bidders. The

net effect of the foregoing would be detrimental to fully responsive and responsible bidders, and could tend to drive them out of competition in those areas where the practices described occur. This result could hardly be said to serve the best interests of the United States, Cf. 14 Comp. Gen. 559."

See also B-157811, October 22, 1965.

We conclude that GSA properly determined that Colorado's bid was nonresponsive for failing to provide an acceptable bid guarantee at the time of bid opening.

The protest is summarily denied.

A handwritten signature in cursive script, reading "Milton J. Fowler".

Acting Comptroller General
of the United States